In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WEEDS, INC., AND GURDON H. SMITH, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES OF AMERICA. } No. 558.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

The writ of error in this case seeks a review of a judgment convicting the plaintiffs in error of certain violations of the Lever Act of August 10, 1917 (40 Stat., c. 53, p. 276), as amended by the Act of October 22, 1919 (41 Stat., 1st session, c. 80, p. 297), making it unlawful, among other things, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and "to conspire, combine, agree, or arrange with any other person * * * to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section."

STATUTE INVOLVED.

The full text of the sections of the statutes which are involved in this case has been so often given in briefs filed in other cases which will be considered with this case that it need not now be repeated. It is sufficient to say that the original Lever Act made it unlawful to make an unjust or unreasonable rate or charge in handling or dealing in certain necessaries, including foods, feeds, fuel, and other articles, but not including wearing apparel. That Act did not provide for criminal prosecutions for the mere making of such unlawful rates or charges. Such rates or charges were condemned, but were to be regulated through a system of licenses, and the prosecution of those who handled the necessaries in question contrary to the terms of the licenses was authorized. The Act of October 22, 1919, however, included wearing apparel in the list of necessaries, for the handling of or dealing in which unjust and unreasonable rates and charges were condemned, and also made a violation of the inhibition against such rates and charges a criminal offense.

THE INDICTMENT.

The indictment was against Weeds, Inc., a corporation conducting a general merchandise store in Binghamton, N. Y., and Charles A. Weed, its president, and Gurdon H. Smith, its general manager.

The indictment contained eight counts, but the sixth count was dismissed.

The first count charges a conspiracy "to exact and to aid and abet in exacting excessive prices for certain necessaries, to wit, wearing apparel." The specific charge is that this conspiracy was entered into about November 1, 1919, and that between that date and April 1, 1920, in furtherance of the conspiracy and for the purpose of effecting its object, the defendants placed upon sale in the store of the defendant corporation various articles of clothing "at prices and figures greatly in advance of the actual cost price thereof." Then followed a list of 26 different lots of wearing apparel, together with the cost price and the price at which they were placed on sale. The percentage by which the cost price was charged to have been advanced varies very considerably. An examination of the figures set out in the indictment shows that, with respect to 7 of the 26 lots specified, the goods were placed on sale at an advance of from 110 per cent to 194 per cent of the cost price, the average being 147 plus per cent. With respect to 12 of the lots the increase ranged from 71 per cent to 100 per cent, the average being 84 plus per cent. With respect to 6 of the lots the percentage of increase ranged from 60 to 66 per cent, the average being nearly 64 per cent. Only one lot was advanced lesss than 60 per cent, and that was advanced 46 per cent. The average for the 26 lots was about 95 per cent.

Each of the remaining counts, omitting the sixth, which was dismissed, charges the sale of a suit of

clothes and the making of an unjust or unreasonable rate or charge for handling or dealing in the same. These sales were made on January 8, 9, 21, and 29, and March 3, respectively. The specific charges were, in the second count, that a suit of clothes costing $20 was sold at $40, making the rate or charge 100 per cent of cost price; in the third count, a suit costing $12.10 was sold at $40, making the rate or charge 230 per cent of the cost price; in the fourth count, a suit costing $23.50 was sold at $45 making the rate or charge 91 per cent; in the fifth count, a suit costing $17.82 was sold for $45.50, a rate or charge of 155 per cent; in the seventh count a suit costing $11.78 was sold for $29.50, making a rate or charge of 150 per cent; and in the eighth count a suit costing $32.25 was sold for $60, making a rate of 86 per cent. (Rec., pp. 3–10.)

PROCEEDINGS IN THE COURT BELOW.

A demurrer challenging the constitutionality of the Act was overruled. (Rec., pp. 12–24.) The defendant, Charles A. Weed, was not tried. As to the other two defendants, the jury returned a verdict of guilty and the court rendered judgment on this verdict. (Rec., pp. 10–11.)

THE CASE AS PRESENTED TO THE JURY.

On the trial the cost price and the selling price of the various articles mentioned in the indictment were, with perhaps a few slight variations, shown to have been as charged in the indictment.

With respect to the first count, charging a conspiracy, it appeared that up to January 1, 1920, the

business thereafter owned and conducted by Weeds Inc., was owned and conducted by Charles A. Weed, and that defendant, Gurdon H. Smith, was the general manager of the business. About January 1, 1920, Mr. Weed incorporated this business, and thereafter it continued to be conducted, except for the act of incorporation, as it had been conducted before and by the same persons and employees. It was shown that the various lots of goods specified in the first count were, under the authority and by the direction of plaintiff in error, Gurdon H. Smith, as general manager of the business, marked for sale at the prices mentioned in the first count and that the clerks in the store were directed to sell at these prices and were not authorized to sell at lower prices without especial authority to do so.

It was also shown that the sales specified in the remaining counts were made as charged. It thus appeared that these suits of clothes were sold at an advance ranging from 86 per cent to 230 per cent of the cost price.

An effort was made by the plaintiffs in error to explain their system of making retail prices. One witness said that they had a well-defined method of fixing charges and that the selling price is based, to start with, on the average of the last season's cost of operating. He then said:

> Taking this as a basis the merchandise as received is marked to show us what we would consider a fair return. For instance, based

> on a percentage of 27½ or 28 per cent we would mark our merchandise from 35 to 37 per cent. This would take care of losses where we take in stuff being—having to be sold at greatly reduced prices, some of it below cost; returned merchandise, which we have to make good to the customer, and which we do make good to the customer in every instance. We have no absolute way of determining what this is going to be; the only thing we can do is to get as near as possible the average on it because it relates to the future that is entirely speculative. There is no way that we can determine in advance what the result of a year's business will be. (Rec., p. 83.)

Continuing the same witness said:

> There are instances where the margin is lower and instances when they are higher. The figures I am using are average percentages on seasonable merchandise.
>
> In fixing the cost of doing business at 27 to 32 per cent I include the total expenses of the store; interest on our investment, rental, salaries of employees, depreciation. It is the entire expenses of the business, but it does not include interest on the investment. The corporation has only been in existence since January 1st. It includes every expense known to the directors. (Rec., p. 83.)

The witness's effort to explain this system by applying it to the transaction alleged in count 1 of the indictment is as follows:

> In count 1, 22d item, we make a charge of $60 for a suit of clothes. The cost price is

fixed at $30.50 actual cost. The mark-up price of that wearing apparel is about one hundred per cent on the cost, but our mark-up is all based on the retail and not on the cost, because all percentages are figured—I call that a mark-up. Based on 28 per cent for a suit of clothes sold for $60 our expense on that would be $16.80, based on the selling price. I am familiar with the custom and practice that exists in the trade other than in our own business. As to whether the percentage of expense is charged against the selling price or cost price, in every instance that I know in our line of business it is charged against the sales price, the actual turnover. I don't know in our particular line of business of any that charge it up on the cost price, although they may do it. The percentages that I have given of 27 or 28 to 31 or 32 per cent are percentages on the selling price of the article and not on the cost. Reduced to concrete figures, 30 per cent on the selling price of an article would be equivalent in rough figures to 43 to 45 per cent on the cost; 33⅓ per cent is exactly 50. (Rec., pp. 83–84.)

The same witness testified that the expenses of the business for the year 1919 were approximately $90,000 (Rec., p. 84) and that the total sales for the year amounted to $330,000 (Rec., p. 79). Explaining again the application of this system, the witness said:

> The article in the second count is from my department. The cost price is $20; that was

actually sold for $40, so that the mark-up was $20; 45 per cent of $20 is $9. Adding the $9 to the $20 gives the entire cost of the article according to the figures; that leaves a net profit of $11, which is 55 per cent of the purchase price. The net profit of handling that article is 55 per cent. (Rec., p. 91.)

Continuing the witness said:

On that one article the store got 55 per cent net profit. The next count, lot No. 20040, man's suit, is the article mentioned in this invoice. That is the suit mentioned in the 4th item in exhibit marked "117" for identification, shown me. It cost the store $21.25 when it was purchased. It was actually sold for $40. The gross mark-up is $18.75, 45 per cent of the purchase price is the overhead and carrying charge as I figure it. The net profit is 42 per cent plus based on the cost price and not based on the retail price. The next count in the indictment, cost price is $23.50. The article sold for $45. That is a suit in my department. The net profit on that article is 46 per cent. Count five is another article in my department, suit lot 22050. Average cost price $17.82. We actually sold that garment for $44.50. Subtract $17.82 from $44.50 it gives $26.72 mark-up. Add 45 per cent to the cost price, I make it 105 per cent, based on the cost. In dollars and cents the profit is $18.67. The profit was more than the cost price of the article. Count 7, I believe, is one of mine. The average cost price on that is $11.78. That garment was sold for $29.50.

> The gross profit is $17.72. * * * The last count in the indictment is another item in my department. Cost price $32.25 and it sold for $60. The gross profit is $27.75. The net profit on that item is 41 per cent, but in dollars and cents approximately $13.24. I said I hadn't those figures, but approximately we turn our merchandise over two to three times a season. (Rec., p. 92.)

And again:

> On this article that we make 105 per cent net profit, assuming that we turned that two and a half times a year, we would make 250 per cent on our money, that year on that particular thing. The people purchasing that article would be paying 250 per cent net profit on that article. (Rec., p. 92.)

The above quotations are made not because they convey any sensible idea of a fixed and definite plan of making prices, but because they furnish the only explanation which the defendants were able to offer.

About all that can be gleaned from the testimony is that, in this store, cost price bore but little relation to the fixing of selling prices. The only thing approaching a system is that plaintiffs in error regarded from 27 per cent to 32 per cent of whatever they saw fit to fix as a selling price as necessary to cover the expenses of the business and the remainder, after deducting cost price, as net profit. But, in fixing selling prices, they apparently recognized no standard and followed no rule. They are charged with selling two suits at $40 each. One cost $20 and the other

only $12.10. Another which cost less—$17.80—was sold at the higher price of $45.50.

Apparently, nothing else appearing, counsel have not the hardihood to insist that such net profits as are above indicated do not obviously include an unreasonable charge for handling or dealing in necessaries. The real defense seems to have been predicated on a claim that, after these goods had been purchased in 1919, the prices to the retailer of similar goods had advanced until to replace these goods would have cost a very much larger amount than the original cost. The contention is, that, through these advances in the wholesale market, the value of the goods which the retailer had in stock had been much enhanced and that the retailer had a property right in this increase of value. It is insisted, therefore, that, in order to determine whether a particular charge is reasonable or not, it must be ascertained whether the charge is unreasonably in excess of the *replacement value* rather than of the *original cost.* In the alternative, it is insisted that, if this contention is not sound in toto, the retailer is entitled to take, as a basis for his charges, the actual wholesale market price of similar goods on October 22, 1919, when the Act was passed, and is not guilty of making an unreasonable charge unless the charge is unreasonably in excess of this price.

For the purpose of making this contention, evidence was offered tending to establish the value or market price of the goods in question, first, on October 22, 1919, and, second, at the dates on which they were

sold. The District Court excluded this evidence and, aside from the constitutional questions involved, this ruling is the ground upon which a reversal is now sought. The record does not disclose what this evidence would have shown, if admitted.

BRIEF.

The constitutional questions involved have been fully discussed in briefs filed on behalf of the United States in other cases which are to be heard and considered with this case. Those briefs are now referred to, and it is not deemed necessary to repeat the argument there made. This brief will, therefore, be confined to the effort to meet some of the arguments advanced by counsel in this case which may not be fully covered by what has already been said.

I.

The Act of October 22, 1919, both when passed and when enforced by the judgment in this case, was a valid exercise of the war power.

The Government's views on this question are very fully set out in its brief in the case of *United States* v. *L. Cohen Grocery Company*, No. 324. It may be helpful, however, to now make specific reply to some of the contentions contained in the brief of counsel in this case. There is but little, if any, controversy as to the general rules of law which must be applied. The only difficulty is with their application to a particular state of facts.

No one will contend that the war powers of Congress are unlimited. The legislation which may be

enacted under this power must, of course, be such legislation as is necessary and proper for carrying the power into execution. The legislation, in other words, must bear some reasonable relation to the conduct of a war. This does not mean, however, that whether particular legislation is proper and valid can be made to depend upon whether the courts think it is necessary, under all the circumstances, to the success of the war. If it deals with a subject which is so related to carrying on the war or to maintaining such a state of affairs as will make the successful conduct of the war possible, the power in Congress exists. If the power exists, the extent to which it shall be used is committed to the discretion of Congress and is not subject to review by the courts. In determining whether a particular Act bears any reasonable relation to a purpose which Congress is empowered to accomplish, the courts always proceed with great caution. The reasons which influence Congress may not seem to individual judges to be sound. In their opinion a particular Act may be calculated to have a bad instead of a good effect upon the purpose in view, but if it is calculated to affect that purpose in any reasonable way, whether for good or evil, it is so related as to be within the power of Congress, and the opinion of Congress as to its necessity must prevail.

In this case it is proper for the court to inquire whether the general subject of regulating and controlling the distribution and prices of wearing apparel. during a state of war. has any proper or reason-

able relation to the exercise by Congress of its war powers. In civilized life and in this climate wearing apparel is just as essential to human existence as food. Moreover, armies can not be raised and supported unless the Government may obtain large quantities of wearing apparel. The magnitude of the Government's requirements, therefore, upon the producers of wearing apparel is such that a scarcity in the markets to which the people of the country must resort is almost inevitable. These people must have the means of subsistence or they can not effectively render the service which they must render in order that the Government may support its armies. No reason can be advanced in support of the Government's right to control the distribution and prices, during a war, of food which do not apply equally to the distribution and prices of necessary clothing. In other words, the right to control the necessaries of life is an incident to the exercise of the war powers of the Government. The control and regulation of necessaries, therefore, has a direct relation to the proper conduct of a war. With this fact established, the inquiry by the courts into the necessity for such control or regulation must end. Its relation to the purpose of the war being established, the extent to which the power should or shall be exercised becomes purely a question of policy the determination of which is not committed by the Constitution to the courts. The extent to which the necessity for legislation of this kind exists will doubtless vary with the progress and prospects of a

war. It is a matter about which individuals will differ. Necessarily, therefore, as the prospects of peace become brighter and the chances of a resumption of actual hostilities slighter, Congress must determine to what extent, if any, it will be safe to abandon the measures deemed necessary when the war was more flagrant. It must always be remembered, however, that until peace is finally established the country is legally at war and the responsibility rests upon Congress to keep the Nation in such a state of preparedness as to meet any emergency that may arise until war is finally terminated. As long as such a state of war exists, Congress may rightfully exert its war powers and, provided the measures which it adopts have any reasonable relation to the successful conduct of a war, is the final judge of the extent to which those powers shall be exerted.

That on October 22, 1919, when this Act was passed, Congress could rightfully exert its war powers was settled and determined when this court held that the Prohibition Act, passed six days later, was a lawful exertion of the war powers of Congress. The cases of *Hamilton* v. *Kentucky Distilleries and Warehouse Co.* (251 U. S. 146), and *Ruppert* v. *Caffey* (251 U. S. 264), upholding the Volstead Act, furnish a complete and conclusive answer to the contentions now made. It is true that those cases recognize that, in order for war measures, dealing with subjects, in times of peace beyond the power of Congress, to be valid there must be not only a technical state of war but there must be some relation between the measures adopted and the

conduct of a war. The court, however, rejected the idea that it could properly review the judgment of Congress as to whether the status of the war at a particular time made it necessary to adopt any measure bearing a relation to the purpose of the war. These considerations were strongly pressed upon the court. But, adhering to its well-established rule, the court went no further with the inquiry than to reach the conclusion that the prohibition of the manufacture and sale of intoxicating liquors, or the use of food products in their manufacture, does bear a relation to the successful conduct of a war. It refused to consider whether the prospects of a resumption of hostilities were so slight that such a prohibition was no longer necessary. It recognized that matter as falling exclusively within the jurisdiction of Congress. It so held although the very Act under consideration had been vetoed by the President, upon the ground that, in his judgment, the war had reached such a stage that so stringent a measure was no longer necessary. The legislative policy of the Nation is declared by the affirmative vote of Congress and the approval of the President, or, in the event of his disapproval, by the passage of an Act over his veto by the majority required by the Constitution. It may be that every Justice on the bench, as an individual, shared the opinion of the President that the legislation was no longer necessary. But, sitting as a court, they gave heed on that matter only to the legislative judgment voiced in a constitutional way. No consideration

tending to show that the military purposes of the war had been accomplished, which is now urged against the present Act, was omitted from those urged against the Prohibition Act, as is clearly shown by the dissenting opinion of Mr. Justice McReynolds in the *Ruppert* case.

The latter case also furnishes an answer to the contention now made that the extension of this law so as to include wearing apparel is void because, while hostilities were in progress, Congress did not see fit to apply to wearing apparel the same rule it applied to food and fuel. In the *Ruppert* case, the Prohibition Act, which was passed in 1918, before the armistice, had permitted the manufacture and sale of beer containing as much as 2¾ per cent of alcohol. A year later, Congress saw fit to prohibit the manufacture or sale of any beer which contained as much as one-half of 1 per cent of alcohol. This presented precisely the same question now made, and the court held that the later Act, as well as the earlier one, was within the power of Congress. Obviously, the fact that during the early stages of the war Congress did not deem it necessary to exert all the power which it might rightfully exert is no obstacle in the way of its exerting that power at later stages of the war if, in its judgment, necessary. Indeed, experience with the laws actually enacted may have impressed upon Congress the necessity of extending them. At any rate, if, in October, 1919, it was competent for Congress, as a war measure, to prohibit the manufacture of one-half per cent beer, which had been permitted throughout the

period of actual hostilities, it was equally competent for that body, at the same time, to exert its power over the distribution of necessaries consisting of wearing apparel, even though it had not previously found it necessary to do this.

The considerations which uphold the Act when passed in October, 1919, equally uphold its enforcement at the time these offenses were committed in January, February, and March, 1920. True, some progress had been made in the process of returning the country to a peace basis. The probability of a resumption of hostilities, however, was scarcely either more or less slight than it was in 1919. The proposed treaty of peace was still the subject of controversy, and apparently no nearer a settlement. The difference between conditions in October, 1919, and March, 1920, was one only of degree. The conditions were essentially the same.

In the brief filed for the appellee in *Tedrow* v. *Lewis*, No. 357, which is referred to and adopted by counsel in this case, mention is made of the fact that in May, 1920, Congress passed a joint resolution, the effect of which was to repeal all these war measures, which resolution was vetoed by the President and not passed over his veto. It is said, however, that the passage of this resolution was an expression of opinion by Congress that this legislation was no longer necessary for war purposes. There are two answers to this suggestion. In the first place, it was not passed until some months after the commission of the offenses in this case. In the second place, the

legislative power of the Nation is vested in Congress and the President. The legislative will is expressed by their joint action, or, where they are in conflict, by the subsequent passage of a measure over the President's veto. Unless a measure is adopted in one of the ways in which it can thus become the law of the land, no vote of Congress can be said to express the legislative will of the Nation. In the *Prohibition* case, where the President and Congress had disagreed, this court very properly gave no heed to the President's views and listened only to the legislative voice as finally expressed in the constitutional way. So, with respect to this resolution, having failed to secure the President's approval, it could not be treated as an expression of the legislative will of the Nation unless subsequently passed by the constitutional majority. This was not done, and the result was that, by the failure to take the proposed action, the legislative judgment was that this measure was still necessary as a war measure.

It is not necessary in this case to consider to what extent, if any, Congress may exert its war powers after a declaration of peace in order to correct the evils growing directly out of the war. We have not yet reached the time when that question is pertinent. This Act by its own terms will expire upon such a declaration of peace. Counsel say, at page 26 of their brief:

> It is not questioned but that war activities must be wound up and that proper time must be allowed for that purpose.

Nothing more than this is necessary to sustain the laws now under consideration. They must be sustained as against this objection unless it is within the province of the court, and not of Congress, to determine when, during a state of war, measures previously adopted and bearing a relation to the conduct of the war may safely be relaxed.

So far as this particular question is concerned, the entire argument for the plaintiffs in error is based on the fallacy that the courts, in considering war legislation deemed by Congress necessary, may properly consider all the circumstances and determine what measures, within the power of Congress, it is necessary or proper to enact. Thus, it is said, at page 20 of the brief:

> It is plain that a war may present a great variety of exigencies. There might be a war with Haiti which would involve only a few naval forces and present no basis whatever for legislation regulating the internal concerns of the American people.

But suppose war should be declared on Haiti? Who is to determine whether only a few naval forces will be required, or whether a large navy and an army will be necessary? Suppose Congress and the President should be of opinion that an army of a half million would be necessary and should proceed to enforce a draft law to raise such an army. Would this court, for one moment, make the validity of the draft law depend upon its opinion as to whether so many

soldiers would be needed? Suppose when the second draft law to raise an army to fight Germany was passed some one had contested that law upon the ground that all the soldiers had been secured under the first draft law that could properly be used in the war, and that therefore another draft was unnecessary. How much consideration would this court have given that contention? Could any court have properly heard evidence and proceeded to determine how large an army was necessary? Suppose, again, war should be declared on Haiti, and suppose the casus belli was such that Congress felt sure that the waging of war against Haiti would immediately involve us with some of the great powers of the world. Would it not be the duty of Congress to take such measures as would be necessary to successfully conduct the war in view of all that seemed to it imminent? If, under such conditions, it should deem it necessary to exercise some measure of control over the necessaries of life, its power to do so could not be successfully questioned. When war is declared, the individual view of every judge in the land may be that the measures taken by Congress are out of all proportion to the threatened danger or to the actual necessities of the case. But, when these judges are sitting as courts, their individual views as to the wisdom or necessity of these measures can have no weight against the constitutionally expressed will of Congress.

II.

There is no unconstitutional taking of property under the act of October 22, 1919.

It is insisted that this Act, as construed by the court below, takes the property of the plaintiffs in error by denying them the right to contract for its sale at the fair market value at the time of sale. This is predicated upon the ruling that the fair and reasonable rate or charge that may be made for handling or dealing in necessaries is the amount charged in excess of the cost price and not in excess of the market value or replacement price. In other words, it is claimed that, if one has purchased property for sale, and if at the time of sale the market value of such property has increased, so that it can not be replaced except at a larger cost, the prevailing market price measures the extent of his property rights, and that to forbid him to sell at the enhanced price plus a reasonable charge for handling is to take his property. The answer to this is that this statute does not take property in any sense. It is merely an exercise of police power as an incident to the exertion by Congress of its war power. This question is fully discussed in the Government's brief in the case of *Oglesby Grocery Co.* v. *United States*, No. 457, which is referred to. The Act treats the labor and capital employed in handling or dealing in necessaries as employed in a business impressed with a vital public interest, and therefore subject to governmental regulation. It recognizes the necessity of conserving

necessaries and securing their fair distribution during a period of war. This requires handling in various ways. The language employed by Congress is comprehensive and includes all handling or dealing, and is evidently intended to apply to every service rendered by capital or labor in bringing necessaries from the producer to the consumer. It may be an open question, as suggested in the *Oglesby Grocery Company* brief, whether the terms used include mere producers, but they undoubtedly include everything that is done in the way of handling or dealing in the commodities in question. If it be assumed that they do not include one who simply produces, as a farmer or manufacturer, they still cover a very wide field. In the case of coal, for instance, a company engaged in mining does not produce coal. It simply employs capital and labor to remove it from the ground. It thus handles the coal as it is found in its natural state. Those who buy and sell it after it is mined deal in it. In the case of all commodities, those who handle them by transporting them, selling them as brokers, or buying and selling them as dealers, are within the terms of the Act. In limiting the charges that each handler or dealer may make, the Government does not take any of his property. It does not interfere with any right to contract guaranteed him by the Constitution. It merely prohibits him from making contracts which are detrimental to the public and to the Government itself during a period of war. It rests upon the same principle as the usury laws of the various States, which are valid exertions of the

police power even in times of peace. These same objections were urged against the Prohibition Act. It was said that distillers had lawfully produced and then owned large stocks of liquors, and that, by prohibiting the sale of such liquors, their property had been taken without due process of law and without compensation. The insistence, however, was rejected by the Court upon the ground that the provisions of the Constitution invoked had no application to the rightful exertion of the police powers of Government. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (251 U. S. 146).

III.

The statute in question is not invalid on account of uncertainty.

In this case, as in the other cases before the court, it is insisted that the statute making it a criminal offense to conspire to exact excessive prices and to make unjust and unreasonable charges is too vague and uncertain in its definition of the offense to be valid and enforceable. In addition to what has been said in the Government's brief in the *Oglesby Grocery Company case*, No. 457, special attention is again called to the language of Judge Sibley in that case, as follows (264 Fed., 691, 695):

> Evidently standards may exist in law or fact to which the Legislature may refer, and the existence of them is a matter of importance. It must be noted that the Act of August 10, 1917, is dealing with necessaries, articles that,

by reason of their necessity, are in common use, dealt in continuously and everywhere. The range of prices and profits in them in time of peace is well established and well understood. The changes that occur in such prices and the causes therefor are well known. The dealer is not in a novel venture. The descriptive words of the act are thus defined by Webster:

Unjust, as "contrary to justice and right; wrongful." Excessive, as "exceeding what is usual and proper." Unreasonable, as "beyond the limits of reason or moderation; immoderate; exorbitant." Immoderate, in turn, means "exceeding just, usual, or suitable bounds." Exorbitant means "deviating from the normal or customary course; going beyond the rule or established limits of right or propriety."

The words used by Congress in reference to a well-established course of business fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer. Evidently increased costs of production and transportation would justify a corresponding increase in price, and necessarily increased expenses in the conduct of business would justify an increased charge for handling; but the exist-

> ence and sufficiency of the justification is left in each case to the courts. This does not differ, in substance, from the situation arising under the Georgia homicide statutes which forbid generally the killing of a human being, but admit of justifications and mitigations which are measured finally by the opinion of juries. The dealer knows what was, in time of peace, usual and customary. Within that limit he is safe. He judges of the justification for departure from it at his own risk. That the usual and customary may serve as defining a crime was ruled in *Omaechevarria* v. *Idaho* (246 U. S. 343).

Persons entering into contracts which may have the effect of restraining in any degree commerce must judge for themselves whether the resulting restraint will be undue restraint. If they judge wrongly, they may be convicted of a violation of the Antitrust Law. So, a merchant dealing in necessaries knows the range of profits which are usually and ordinarily included in the selling prices of goods, and therefore knows what are ordinarily reasonable prices. If conditions exist which will justify a departure from the prices and profits which have theretofore been customary and therefore reasonable, a merchant must judge for himself as to the extent to which the new conditions justify a departure. The standard is what is usual and customary under ordinary conditions. This furnishes a standard by which, with a fair degree of certainty, the increases justified by changed conditions may be measured. In apply-

ing this standard, he takes no more risk than when one entering into a contract must determine for himself whether the result will be an undue restraint of trade. The definition of the offense is just as definite and certain in the one case as in the other.

Commenting on the case of *Omaechevarria* v. *Idaho* (246 U. S. 343), counsel, page 68 of their brief, say:

> Objection was taken to the statute because of the reference to the prior occupation as a "usual" one. But this reference to what was customary did not go beyond the bounds of a permissible generalization and referred to a standard well understood by every one familiar with the cattle ranges.

So, in this case, by fair interpretation, the statute fixes as the standard what is usual and customary under similar circumstances, and this referred to what was well understood by every one familiar with the mercantile business. In the language of counsel, therefore, it "did not go beyond the bounds of a permissible generalization."

IV.

The statute is not subject to constitutional objection upon the ground of an arbitrary classification.

The Government's views on this question have been stated at length in its brief in the case of *Tedrow* v. *Lewis*, No. 357, and but little need be added to what is there said.

Counsel have referred to the suggestion made in the Government's brief in the *Tedrow* case that section 4

of the statute may not apply to a manufacturer or mere producer, and have asserted that the Department of Justice has, in some cases, in the lower courts, prosecuted manufacturers. If the latter assertion is correct, it can have no bearing on this case. The question now is what the Act means and not whether the Department of Justice has always been consistent in the construction placed upon it. Moreover, it is said in the Government's brief in the *Tedrow* case that, under any construction of the Act, a manufacturer may be guilty of making unreasonable rates or charges for handling his products after the process of manufacture has been completed. Again, a manufacturer may subject himself to the rules applied to dealers by establishing places of business and holding his products for sale away from the place of manufacture and in the manner in which they are sold by merchants.

There are articles in the list of necessaries where no one having any connection with them at any stage can be said to be a producer in the sense in which that term is used above. Thus, there is no doubt that no person having any part in bringing coal from the earth where it is found to the consumer can be said to be a producer. The coal has been produced by nature and needs only to be handled. The miner is therefore engaged in handling it and is clearly within the terms of the Act.

At any rate, a classification which separates producers from handlers and dealers would not be arbitrary. If this is what the Act does, the proviso simply puts the farmer in the same class with other

producers. But if the manufacturer is held to be subject to the Act with respect to his charges for manufacturing, there are, as pointed out in the brief in the *Tedrow* case, sufficient differences between his business and that of the farmer to justify the classification. In some lines, the manufacturer handles the products of the farm by putting them in the shape in which the consumer requires them.

For these and the reasons urged in the Government's brief in the case of *Tedrow* v. *Lewis*, it is respectfully submitted that the proviso that the provisions of the Act shall not apply to farmers with respect to their own products is not an arbitrary classification.

V.

In declining to treat replacement value as the standard, the court below properly construed the statute.

The Government's views on this question have also been presented in the *Oglesby Grocery Company* case, No. 457.

The occasion for the passage of this statute was that the war, with its demands upon the manhood and resources of the country, necessarily weakened competition and tended to diminish the supply of available necessaries. The prime object of the Act was to lay a restraining hand upon those whose avarice might lead them to demand for services rendered by themselves or their capital all that they could extort under the stress of war conditions. To accomplish this purpose, labor and capital are treated as rendering a service to the public in distributing

necessaries, and the amount which may be demanded for this service is limited. True, this particular section of the Act does not use the words "profit" or "prices." Instead, more comprehensive language is used. This language, however, has a necessary relation to both profits and prices. The price which a merchant charges includes, of course, his profit. When he purchases at one price and sells at another, the latter price necessarily includes his profit. This profit is only another name for the charge which he makes for the use of his capital and his labor. The difference between cost and selling price, therefore, is the charge which he has made for handling or dealing in the commodity. If there has been no advance in the market price, the charge he thus makes is, of course, the difference between cost price and selling price. If the market price has advanced and his competitors see fit to take advantage of the advance, he may sell at a higher price than he could have obtained if there had been no advance in the market. If he does so, however, the difference between the cost price and this higher selling price still is the measure of compensation which he has received for the use of his capital and labor. Whether, therefore, the profit he reaps is merely the usual difference between cost price and selling price, or whether it includes an amount which he has been able to add on account of an advancing market, it nevertheless represents in exactly the same sense the rate or charge for handling or dealing in necessaries which the statute says shall be reasonable. The

expense of conducting the business and the cost of handling the goods is exactly the same whether the market has remained stationary or has advanced. What is a reasonable charge for the service rendered in the one case is a reasonable charge in the other. The statute prohibits an unreasonable charge in either case, just as the statutes of the various States prohibit an unreasonable charge for the use of money.

VI.

Rulings of the court below.

The assignments of error with respect to the exclusion of testimony and the charge of the court are practically all based on the contention that replacement values should be taken as the basis for fixing reasonable charges. What has already been said is therefore an answer to these assignments.

VII.

Verdict of the jury amply supported by the evidence.

It must not be understood that the Government insists that a case can be made out under this statute by proving, without more, the cost price and the selling price of commodities. The jury, under the statute, must determine what are reasonable charges and rates, but their determination of this question must be based upon competent evidence and not upon their individual judgment uncontrolled by evidence. There must be evidence from which the jury, applying common sense, may fairly determine that a particular rate is unreasonable.

An indictment merely charging the cost price and the selling price without the additional charge that these involved an unreasonable rate would not state an offense. So, there must be some evidence to sustain this necessary averment of the indictment. In some cases the price may be so obviously extortionate as to require but little evidence. The reasonableness of a charge for service, of course, depends very largely upon what it costs to render that service.

In this case the evidence shows that the difference between cost price and selling price ranged from around 70 per cent to as high as 230 per cent. Evidence was offered as to the expense of doing business, and the extreme claim made was that 45 per cent would cover all expenses and all contingencies that could be reasonably anticipated, and that all above this amount would be net profit. This left a net profit, in one instance at least, of more than the cost price. No jury would need any further evidence to justify the conclusion that the charge was exorbitant. And in practically all instances it was shown by the defendant's own witnesses that the net profit, after allowing the extreme amount claimed for the expenses of the business, including overhead charges, was in excess of 50 per cent of the cost price, and that the usual turnover was two or three times a year.

Indeed, no contention seems to be made that these prices did not include unreasonable rates and charges, unless the plaintiffs in error were entitled to base their charges on replacement values instead of cost price. What these replacement values were does not

appear because the evidence on that subject was excluded. There is, therefore, no error in this judgment unless it can be said that the exclusion of this evidence was material error.

In order to reverse a case because of the improper exclusion of evidence, this court must be able to determine from the record that the evidence offered was material. Hence it is not sufficient for the record to show that evidence relating to a given subject was offered, but it must disclose what the evidence would have been if admitted.

In this case the evidence, if admitted, might have shown so slight an advance in the market price as to be entirely insignificant. In that event, it would have been immaterial, even if competent, for its effect would have been to furnish a further justification for the verdict. It is submitted, therefore, that in the absence of anything in the record to show what this evidence would have been, the assignment of error based on its exclusion can not be considered.

CONCLUSION.

It is respectfully submitted that the Act in question is constitutional, that there is no error in the record, and the judgment should be affirmed.

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Solicitor General.

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